Supreme Court of the United States.

Nos. 178 and 184.—October Term, 1905.

Security Mutual Life Insurance Company, Plaintiff in Error, 178 *vs.* Henry R. Prewitt, Insurance Commissioner of the State of Kentucky.	In error to the Court of Appeals of the State of Kentucky.
The Travelers Insurance Company of Hartford, Connecticut, Plaintiff in Error, 184 *vs.* Henry R. Prewitt, Insurance Commissioner of the State of Kentucky.	

[May 14, 1906.]

Mr. Justice Day (with whom concurs Mr. Justice Harlan) dissenting.

In view of the importance and far-reaching effect of the decision just announced, and being unable to concur therein, we have deemed it not improper to briefly state the grounds upon which our objection to the decision of the court rests.

Certain principles of constitutional law are firmly settled by the decisions of this court and need no citation of cases in their support. The Constitution of the United States and the laws passed in pursuance thereof are the supreme law of the land, and of controlling authority over all the people, and in all the States of the Union. It is equally well settled that the privilege of resorting to the Federal courts for litigation of rights in controversies between citizens of different States is created by and exercised under authority of the Constitution of the United States, which secures to citizens of another State, when sued by a citizen of a State in which the suit is brought, the absolute right to remove their cases into the Federal court upon compliance with the terms of the act of Congress enacted to effect that purpose. This principle was announced in terms in *Insurance Company* v. *Morse*, (20 Wall. 445,) has never been questioned, and is affirmed in frequent decisions of this court. No State regulation in hostility to this principle can be recognized without endangering the supremacy of the National Constitution.

The Kentucky statute imposes but a single condition necessary to be now considered upon the right of foreign corporations to do business in that State. It says in effect to a company not yet licensed to transact business within its borders, there is no objection to the company transacting business

in this State; on the other hand, it is desirable that it shall do so, subject to the condition that the company cease to do business in the State and its license be revoked the moment it attempts to avail itself of its constitutional right to remove a controversy into the Federal court under the terms of the Federal statute passed to make the constitutional right effectual. From that time its further right to do business shall cease and determine and its license be revoked. To companies lawfully within the State, as are the appellants in these cases, it makes the like proposition: You may carry on your business, having complied with other conditions, but the moment you undertake to exercise the constitutional right of removal to a Federal court your license shall be revoked, and all authority to do business in the State shall cease. That this can be constitutionally done is affirmed in the decision of the court in these cases, because of the principle that the State, having the right to exclude foreign corporations from its borders, may do so for any reason, although such action, as in the present case, is based solely upon the denial of the right of removal in proper cases by a non-resident citizen, of cases coming within the act of Congress, to the Federal courts.

As a general proposition it is undoubtedly true that a State may prevent foreign corporations, at least those not engaged in interstate commerce, from doing business within its borders and may impose restrictions upon the right to transact local business as it may see fit. But this right in our opinion is not without limitation. It is the established doctrine of this court that a restriction of this power is found in the denial of the right to a State to impose a condition in direct conflict with the Constitution of the United States, in requiring a corporation, as a sole condition of doing business within the State, to surrender the right of removal created and enforced by the Federal Constitution and laws in advance, or give it up after its admission to do business in the State.

The question came directly before this court in the case of *Insurance Company* v. *Morse*, (20 Wall. 445,) in which it was held that a State might not require a foreign corporation, as a condition of doing business within its borders, to file an agreement that such company would not remove the suit for trial into a United States Circuit Court or other Federal court. The act was held to be repugnant to the Constitution of the United States and the laws passed in pursuance thereof, as it denied the right of removal secured to the citizens of another State by the Constitution and laws of the United States. The question arose again in the case of *Doyle* v. *Continental Insurance Co.*, (94 U. S. 535.) In that case it was held by the majority of the court, Mr. Justice Bradley, Mr. Justice Miller and Mr. Justice Swayne dissenting, that the State of Wisconsin might lawfully enact a statute providing that if any foreign insurance company should transfer a suit brought in the State to a Federal court its license to do business would

be cancelled and revoked, and the doctrine was laid down that as a State had the right to exclude the company for any reason, the means by which it should cause such exclusion or the motives of her action were not the subjects of judicial inquiry. Thus the decisions of this court stood until the case of *Barron* v. *Burnside*, (121 U. S. 186,) was brought to its attention, in which it was held that a statute of Iowa, requiring a foreign corporation, as a condition of doing business in the State, to stipulate that it would not remove cases into the Federal court, which it had the right under the laws of the United States to remove, was void. And the case of *Home Insurance Co.* v. *Morse, supra*, was approved, and *Doyle* v. *Continental Insurance Co., supra*, qualified and explained. In this case Mr. Justice Blatchford delivered the unanimous opinion of the court. It is apparent from its perusal that the principle stated in *Insurance Co.* v. *Morse* and in the dissenting opinion in the Doyle case was recognized and affirmed, and the unqualified right of exclusion denied. After showing that the right to remove was the creation of the Federal Constitution and laws and could not be impaired without deprivation of a Federal right, the ground of the decision was stated to be:

"As the Iowa statute makes the right to a permit depend upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

And further, in speaking of the Doyle case:

"The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse*, must be regarded as not in judgment."

And that the court did not regard the right of a corporation in that respect as differing from that of an individual is shown in the observation:

"Its right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another State of his right to remove suits."

In concluding the decision the court said:

"In all the cases in which this court has considered the subject of the granting by a State to a foreign corporation of its consent to the transaction of business in the State, it has uniformly asserted that no conditions can be imposed by the State which are repugnant to the Constitution and laws of the United States. (*La Fayette Ins. Co.* v. *French*, 18 How. 404, 407; *Ducat* v. *Chicago*, 10 Wall. 410, 415; *Insurance Co.* v. *Morse*, 20 Wall. 445 456; *St. Clair* v. *Cox*, 106 U. S. 350, 356; *Phila. Fire Ass'n* v. *New York*, 119 U. S. 110, 120.)"

It is thus apparent that the decision was made to turn, not upon the question of whether the agreement not to remove had been required in advance, or imposed as a condition of remaining in the State after entry therein, but rested upon the doctrine that, conceding the right of the State to exclude foreign corporations, its right to do business within the State could not be conditioned upon the surrender of a privilege secured to it by the Constitution and laws of the United States, and that the right to remove given to a foreign citizen or corporation was a right thus secured. The doctrine of *Barron* v. *Burnside* is in our judgment decisive of the contention made in the present case. If it be true, as specifically declared in that case, that the right to exclude a foreign corporation could not be made to depend solely upon the surrender by the foreign corporation of this constitutional right and privilege, it irresistibly follows that its application is fatal to the constitutionality of the statute here in question. The right of the insurance company under the present statute to do business within the State of Kentucky turns upon its willingness to surrender this privilege. If it will do so, it may continue to do business with the State; if it will not, its license will be revoked and its right to do local business destroyed. In short, it may continue to do business within the State, if it will consent to the surrender of a Federal right. We think this brings the case squarely within the limitations of the right of the State to exclude foreign corporations from its midst, and, to sustain the statute, permits a State, because of the exercise of a constitutional right, to close its gates to corporations equally entitled with private citizens in this respect to the protection given by the Constitution. The doctrine that the surrender of rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a State is at war with that instrument, and if adopted or sanctioned by all the States would nullify the supreme law of the land in some of its most essential provisions.

An examination of the decisions subsequent to *Barron* v. *Burnside*, *supra*, is convincing to the effect that it has been accepted by the courts, National and State, as decisive of the proposition therein announced, that a State statute giving the right to do business or to terminate a business already instituted, upon the sole condition of the surrender of a Federal right, secured by the Consitution, is void and of no effect. The case, thus interpreted, has been cited and followed in subsequent cases in this and other Federal courts.

In *Southern Pacific Co.* v. *Denton*, (146 U. S. 202, 207,) Mr. Justice Gray, delivering the unanimous judgment of this court and referring to a statute of Texas similar to the one now under consideration, said: "That statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege

secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions," citing *Insurance Company* v. *Morse* and *Barron* v. *Burnside*. The same eminent judge, delivering again the unanimous judgment of this court in *Martin* v. *Baltimore & Ohio Railroad*, (151 U. S. 673, 684,) and again citing the *Morse* and *Barron* cases, said: "The Baltimore and Ohio Railroad Company, not being a corporation of West Virginia, but only a corporation of Maryland, licensed by West Virginia to act as such within its territory, and liable to be sued in its courts, had the right, under the Constitution and laws of the United States, when so sued by a citizen of this State, to remove the suit into the Circuit Court of the United States, and could not have been deprived of that right by any provision in the statutes of the State." Again, upon the authority of the same cases, including the Denton case, this court, by its unanimous judgment in *Barrow Steamship Co.* v. *Kane*, (100 U. S. 100, 111,) said: "So statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void." To the same effect was the case of *Blake* v. *McClung*, (172 U. S. 239, 255–6,) in which it was said, upon the authority of the *Morse*, *Barron* and *Denton* cases: "It was accordingly adjudged in *Barron* v. *Burnside*, (121 U. S. 186, 200,) that an Iowa statute requiring every foreign corporation named in it, as a condition of obtaining a license or permit to transact business in that State, to stipulate that it would not remove into the Federal courts suits that were removable from the State courts under the laws of the United States, was void because it made the right to do business under a license or permit dependent upon the surrender by the corporation of a privilege secured to it by the Constitution. . . . So statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void." In *Chattanooga, R. & C. R. Co.* v. *Evans*, (66 Fed. Rep. 809, 814,) heard before Judges Taft, Lurton and Severens, the Circuit Court of Appeals for the Sixth Circuit, speaking by Judge Lurton and referring to the Morse and Barron cases, recognized the right of the State to prescribe terms upon which a corporation of another State or country may carry on business within its borders, but taking care at the same time to say: "That there are limitations upon this power is equally well settled, for it cannot impose as a condition that such nonresident corporation shall not resort to the courts of the United States."

In *Bigelow* v. *Nickerson*, (70 Fed. Rep. *supra*,) Judge Jenkins, speaking for the Circuit Court of Appeals, Seventh Circuit, after reviewing the cases in this court, said:

"We consider the question foreclosed and no longer open to discussion. No condition imposed upon a right granted by a State, which prevents one from availing himself of his constitutional prerogative of appeal to the courts of the United States can be upheld."

In *Reimers* v. *Seatco Man. Co.*, (70 Fed. Rep. *supra*,) Judge Taft, speaking for the Circuit Court of Appeals, Sixth Circuit, said:

"The right of a State to impose conditions upon foreign corporations doing business therein is not unlimited. In *Insurance Co.* v. *French*, (18 How. 404,) Mr. Justice Curtis, speaking for the Supreme Court, said:

"'A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. (*Bank* v. *Earle*, 13 Pet. 519.) This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.'

"In *Southern Pacific Co.* v. *Denton*, (146 U. S. 202, 13 Sup. Ct. 44,) it was held that the law which permitted a non-resident corporation to do business within its territory on condition that it should forfeit such permit if it removed a suit brought against it into the court of the United States held within the State, was unconstitutional and void, and could give no validity and effect to any agreement or action of the corporation in obedience to its provisions, because it thereby was compelled to surrender a right and privilege secured to it by the Constitution and laws of the United States; citing *Insurance Co.* v. *Morse*, (20 Wall. 445,) and *Barron* v. *Burnside*, (121 U. S. 186, 7 Sup. Ct. 931.)"

Notwithstanding these cases, it is now adjudged that so far as the Constitution of the United States is concerned, it is competent for any State to withdraw or cancel a license given to a corporation of another State to do business within its limits whenever and solely because that corporation, being sued in a State court, has the case removed to the Federal court for trial or hearing. If each State should enact a statute, such as the one before us, the right secured to a corporation when sued in the courts of a State other than the one creating it, to invoke the jurisdiction of the Federal court, would be abrogated throughout the whole United States, although such right is secured by the Constitution and by valid acts of Congress. We cannot assent to this view. It amounts to a practical nullification in respect to such corporations of the supreme law of the land and places important constitutional rights at the mercy of the several States.

In the State from which this case comes, after a full review of the decisions of this court, the same conclusion was reached in *Commonwealth* v. *East Tenn. Coal Co.*, (97 Ky. 238.)

The same view of the effect of *Barron* v. *Burnside* has been accepted by the text writers. (2 Cook on Corporations, 3d ed. 1675; Moon, Removal of Causes, [1901,] §§ 30 and 31, and notes in which the author expresses the view that the Doyle case has become obsolete and is practically overruled by *Barron* v. *Burnside* and subsequent cases in this court, § 30, note 3; Curtis' Jurisdiction of the United States Courts, 2d ed. by Merwin, 187.)

The principles announced in *Doyle* v. *Ins, Co.* and *Barron* v. *Burnside* are directly opposed the one to the other, and cannot both prevail. The former case was decided upon the principle that as the State has the full right to exclude a foreign corporation it may do so for any reason or for no reason. The latter case qualified this doctrine with the limitation that the exclusion may not be solely because the corporation was exercising or would not yield the right to avail itself of a privilege created and protected by the Federal Constitution.

After such repeated affirmance and general acceptance, we do not think the doctrine announced in *Barron* v. *Burnside* ought to be qualified or detracted from, and certainly it seems to us that the court should not return to the rejected doctrine of the Doyle case.

If a State may lawfully withhold the right of transacting business within its borders or exclude foreign corporations from the State upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the State from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the State may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the State to exclude includes the right, when exercised for any reason or for no reason, the State may say to the foreign corporation,—You may do business within this State, provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws; and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions. This dangerous doctrine, asserted in the majority opinion in the Doyle case, destroyed and overthrown as we think in *Barron* v. *Burnside*, which latter case has been consistently and repeatedly followed in this court and in other courts, Federal and State, from that day to this, ought not now to be rehabilitated and restored to its power to work destruction of rights deemed so essential to the safety of citizens, natural and arti-

ficial, that they have been secured by the provisions of the Federal Constitution.

In the opinion of the court in this case the doctrine that a corporation cannot be permitted to be deprived of its right to do business because of the assertion of a Federal right is said not to be denied, because the right of a foreign corporation to do business in a State is not secured or guaranteed by the Federal Constitution. Conceding the soundness of this general proposition, it by no means follows that a foreign corporation may be excluded solely because it exercises a right secured by the Federal Constitution. For, conceding the right of a State to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the State would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the State, and, as we have pointed out, the State might thus deprive every foreign corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution. Furthermore, it is stated in the prevailing opinion that while the State may exclude in advance or deprive a foreign corporation of the privilege of doing business after it is lawfully in the State, because of the exercise of a Federal right, it cannot require the corporation to agree in advance that it will waive such right, as that, it is admitted, would be unconstitutional.

We think the distinction is without a substantial difference and makes the validity of the act turn upon the means of attaining the same unlawful end. In either alternative the corporation is excluded from the State because it will not consent to surrender the right given it under the Federal Constitution. While we concede the right of a State to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Constitution, which secures to alien citizens the right to resort to the courts of the United States.

In the cases decided in this court subsequently to *Barron* v. *Burnside*, while the general proposition is affirmed that a State may prescribe conditions upon which a foreign corporation may do business within its borders, in no one of them is it asserted that the State may exclude or expel such corporations because they insist upon the exercise of a right created by the Federal Constitution. On the contrary, this court has repeatedly said that such right of exclusion was qualified by the superior right of all citizens to enjoy the protection of the Federal Constitu-

tion. The Federal authority gives no right to deny to the citizens of a State access to the local courts of a State. For wise purposes the Federal Constitution has provided courts for citizens of different States, believed to be free from local influence and prejudice, and laws have been passed by Congress to make the privilege of resort to them effectual. In our view no State enactment can lawfully abridge this right or destroy it, directly or indirectly by affixing heavy pealties to its assertion by those lawfully entitled to its enjoyment. We think *Barron* v. *Burnside* was intended to overrule the contrary declaration which is found only in the Doyle case, which is inconsistent with or opposed to every other declaration directly upon the subject in the opinions of this court.

We are of opinion that the statute in question, so far as it authorizes the cancellation of a license given by a State to a corporation to do business within its limits, whenever such corporation, in the exercise of a constitutional right, has a suit brought against it in a State court removed to the Federal court for trial, is unconstitutional and void.

For the reasons stated we are constrained to dissent.

True copy.

Test:

Clerk Supreme Court, U. S.